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No. _____

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MARCELO RAMOS MOTTA,
Petitioner

v.

SAMUEL WEISER, INC.
Respondent

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Was proof of the capacity of an unincorporated association to own property inherent in petitioner's burden to prove the ownership element of a copyright infringement claim, where his ownership stemmed solely from his membership in the association?

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OPINIONS AND JUDGMENTS BELOW

The opinion and judgment of the Court of Appeals for the First Circuit, affirming the trial court's decision, is Motta v. Samuel Weiser, Inc., 768 F.2d 481 (1st Cir. 1985).

The opinion and judgment of the District Court for the District of Maine, in favor of the defendant, is Motta v. Samuel Weiser, Inc., No. 81-0459-P (D. Me. Dec. 6, 1984).

STATUTES

17 U.S.C.S. §501(b) (Law. Co-op. 1978) provides as follows:

> §501. Infringement of Copyright
> (b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of sections 205(d) and 411 [17 USCS §§205(d) and 411], to institute an action for any infringement of that particular right committed while he or she is the owner of it.

17 U.S.C.S. §411(a) (Law. Co-op. 1978) provides as follows:

> §411. Registration as prerequisite to infringement suit.
> (a) Subject to the provisions of subsection (b), no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title [17 USCS §§101 et seq.]. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused the applicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to

become a party shall not deprive the court of jurisdiction to determine that issue.

17 U.S.C.S. §507(b) (Law. Co-op. 1978) provides as follows:

> § 507. Limitations on action.
> (b) Civil actions. No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.

STATEMENT OF THE CASE

Petitioner (Motta) sued respondent publisher (Weiser) for, inter alia, infringement of copyrights in works by Aleister Crowley, a British mystic of the early twentieth century. Judge Gene Carter of the District Court, without a jury, decided the case on the issue of ownership of the copyrights, which was the principal factual issue addressed at trial. The District Court did not reach petitioner's failure to register its copyrights before filing suit, nor did it address the statute of limitations and other defenses raised below.

Motta's primary contention at trial was that he and his Tennessee non-profit corporation, the Society Ordo Templi Orientis (SOTO), owned the Crowley copyrights because 1) Crowley bequeathed them to an unincorporated association

known as the Ordo Templi Orientis (OTO), and 2) Crowley's successor as head of the OTO ("Outer Head of the Order", or OHO), Karl Germer, designated Motta to succeed him as OHO. Judge Carter rejected Motta's claim to be OHO because his documentary evidence fell far short of establishing that Germer ever so designated him, and because his testimony was unworthy of belief. (Motta v. Samuel Weiser, Inc., No. 81-0459-P, slip op. at 8-10).

Motta also contended that he and SOTO could enforce the Crowley copyrights as tenants in common with all other OTO members. The District Court rejected this contention as well. It held that in order for an unincorporated association such as the OTO to own property, including through its individual members, it must have a distinct, identifiable membership. Id. at 19. Lacking evidence enabling it "to

recognize a definite organization which has the exclusive right to use of the OTO associational name," id. at 22, the Court found that the OTO's membership could not be ascertained. The District Court noted that while neither party "expressly raise[d] in a discrete context the issue as to whether the OTO is a cognizable legal entity", id. at 25, they clearly raised the issue of ownership as an element of infringement, with capacity for ownership being an essential predicate to ownership.

On appeal Motta argued that the District Court's decision was based on an issue never raised below, and thus it violated due process under Reynolds v. Stockton, 140 U.S. 254 (1891). The Court of Appeals for the First Circuit rejected this argument, holding that the Reynolds requirement that an issue be "tendered by the pleadings" was satisfied below.

Motta v. Samuel Weiser, Inc., 768 F.2d 481, 486 (1st Cir. 1985). Judge Davis, sitting by designation, wrote that the record demonstrated that Weiser hotly contested ownership, asserted Motta's lack of standing under 17 U.S.C. §501(b), and made no admission or stipulation regarding the issue of capacity. In short, Motta simply failed to prove the ownership element of his infringement claim. The Court of Appeals also declined to address the petitoner's failure to register the copyrights, and the statute of limitations and other defenses.

SUMMARY OF ARGUMENT

The petition should be denied because the Court of Appeals properly applied the law in Reynolds v. Stockton, 140 U.S. 254 (1891), to the record before it. The Court correctly found that proof of the capacity of an unincorporated association to own property was inherent in the burden of proof of ownership of the copyrights at issue, and thus "tendered by the pleadings", when Motta's only plausible claim of such ownership was through membership in that association.

The petition should also be denied because this case does not raise an issue of sufficient importance to warrant this Court's attention. Whether the petitioner bore the burden of proof on a sub-issue concerning copyright ownership is not a substantial federal question that merits this Court's concern.

The petition should also be denied because, as to seven of the eleven copyrights at issue, petitioner failed to comply with 17 U.S.C.S. §411 (Law Co-op. 1978) by registering those copyrights prior to initiating this action. That failure deprived the District Court (and all subsequent courts) of jurisdiction.

The petition should also be denied because neither Court below addressed a number of issues, including jurisdiction and the statute of limitations, which will likely deny petitioner relief regardless of this Court's action on the question presented.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals correctly applied established precedent.

The Court of Appeals correctly applied established legal precedent to the

record before it. Petitioner Motta bore the burden of proving ownership of the copyrights of Aleister Crowley as part of his infringement claim. 17 U.S.C.S. §501(b) (Law. Co-op. 1978). Respondent Weiser vehemently opposed proof of ownership. Further, Weiser asserted Motta's lack of standing under section 501(b) as an affirmative defense. Motta v. Samuel Weiser, Inc., 768 F.2d 481, 486 (1st Cir. 1985). Applying the rule in Reynolds v. Stockton, 140 U.S. 254 (1891), that an issue must be "tendered by the pleadings" to form the basis of a judgment, the Court of Appeals held that the capacity of the OTO to own property was inherent in Motta's burden of proving ownership, and that the Reynolds requirement had been satisfied. Motta, 768 F.2d at 486-87. Motta's characterization of the decision below as "overturning" Reynolds is

inaccurate. The Court of Appeals gave full consideration to the issue and correctly applied the established precedent of this Court. Reynolds, 140 U.S. 254; see United States v. Seminole Nation, 299 U.S. 417 (1937).

II. The question presented is not sufficiently important to warrant the attention of this Court.

This case raises no question, federal or otherwise, warranting the attention of this Court. Motta's contention stems from a disagreement with the District Court over the scope of his burden of proof on the ownership of copyrights. Moreover, he presents no argument questioning either lower court's view of the law controlling an unincorporated association's capacity to own. The issue for which review is sought here is whether Motta had to supply

evidence sufficient to permit a finding of such capacity as part of his burden to prove ownership, or whether the OTO's capacity had to be raised separately. The issue is simply not significant enough to merit this Court's concern.

III. The Federal Courts have never had jurisdiction as to seven of the eleven disputed copyrights.

Motta did not comply with 17 U.S.C.S. §411 by registering with the Copyright Office seven of the copyrights prior to suing for infringement. Registration is a jurisdictional prerequisite to the institution of an infringement claim. 17 U.S.C.S. §411(a) (Law Co-op. 1978); Hagendorf v. Brown, 699 F.2d 1018 (9th Cir. 1983); Burns v. Rockwood Distributing Co., 481 F. Supp. 841 (N.D. Ill. 1979); International Trade Management, Inc. v. United States, 553 F.

Supp. 402 (Ct. Cl. 1982). This Court lacks subject-matter jurisdiction as to the bulk of Motta's case, as did the courts below despite their failure to address this issue.

IV. Even if successful before this Court, Petitioner will likely fail below on remand because of unresolved issues in the record.

Neither lower court addressed several defenses which, in addition to lack of subject-matter jurisdiction, preclude relief for Motta. Paramount among these other defenses are two.

First, as a co-owner with other OTO members, Motta cannot preclude them from fully exploiting the subject-matter of the copyright. Edward B. Marks v. Jerry Vogel Music Co., 140 F.2d 266 (2d Cir. 1944). The record demonstrates that another OTO member, Grady McMurtry,

licensed Weiser to publish works of Crowley without restriction. Appendix at 678-79, Motta v. Samuel Weiser, Inc., 768 F.2d 481 (1st Cir. 1985); id. at 483, n. 4.

Second, the statute of limitations, 17 U.S.C.S. §507(b) (Law. Co-Op. 1978), requires commencement of the action within three years. Five of Motta's claims are barred completely.

CONCLUSION

The Court of Appeals properly applied established precedent to the record and correctly decided the issue before it. That issue does not in any event merit the attention of this Court. The bulk of Petitioner's case should never have been heard for lack of subject matter jurisdiction. Numerous defenses raised but not addressed below will preclude relief for petitioner even if this Court grants the petition. Respondent prays that the petition be denied.

Respectfully submitted,

By: _____

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November 22, 1985

CERTIFICATE OF SERVICE

I, James S. Erwin, hereby certify that on this 22nd day of November, 1985, I mailed first class, postage prepaid, to the Clerk's Office of the U.S. Supreme Court forty copies of this Response to Petition, and on this same day I mailed three copies by first class, postage prepaid, to Daniel B. Stone, esquire, 1700 Pennsylvania Ave, NW, Washington, DC 20006, Attorney for Petitioner.

James S. Erwin